

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LATOYA MARIE JOPLIN,

Defendant-Appellant.

UNPUBLISHED

December 18, 2008

No. 279069

Washtenaw Circuit Court

LC No. 06-001239-FC

Before: Saad, C.J., and Fitzgerald and Beckering, JJ.

PER CURIAM.

A jury convicted defendant of first-degree felony murder, MCL 750.316(1)(b), and first-degree child abuse, MCL 750.136b(2), arising from the beating death of her three-year-old daughter. The trial court later vacated the child abuse conviction and sentenced defendant to life in prison for the murder conviction. For the reasons set forth below, we affirm.

I. Other Acts Evidence

Defendant claims that the trial court erred when it excluded evidence that her boyfriend, Sylvester Alexander, has a history of assaultive behavior when he becomes intoxicated. Defendant argues that this evidence was admissible under MRE 404(b)(1), and that the exclusion of the evidence violated her constitutional right of confrontation and her right to present a defense.

A. MRE 404(b)

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998).

MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other

crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

MRE 404(b) applies to all bad acts evidence, whether it concerns the defendant, a witness, the victim, or some other person. *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995).

Here, defendant sought to introduce evidence that, in 1988, Alexander hit a former girlfriend in the head with an iron and cracked her skull; that in 1990, he broke into the same woman's home and stabbed her boyfriend; and that in 2005, Alexander broke into another former girlfriend's apartment, dragged her into the hallway, beat her about the face and head, and later intimidated her to prevent her from testifying against him.¹

"To be admissible under MRE 404(b), bad-acts evidence must satisfy three requirements: (1) the evidence must be offered for a proper purpose; (2) the evidence must be relevant; and (3) the probative value of the evidence must not be substantially outweighed by unfair prejudice." *People v Kahley*, 277 Mich App 182, 184-185; 744 NW2d 194, 196-197 (2007). Defendant asserts that Alexander has a propensity for assaulting his girlfriends, ex-girlfriends, and their boyfriends when he becomes intoxicated. However, none of the prior incidents involved children or the specific victim in this case. Thus, defendant has failed to show that, on the basis of his prior assaults, Alexander could have acted in accordance with a common scheme or plan. Further, Alexander's prior acts do not share any peculiarities, patterns, or trademarks in common with the present case. *People v Sabin (After Remand)*, 463 Mich 43, 63-65; 614 NW2d 888 (2000). Therefore, the evidence is not logically relevant to any fact in issue. Rather, as the trial court found, the prior acts would have shown only that Alexander has a propensity for alcohol-related domestic violence. Accordingly, the trial court did not abuse its discretion in excluding the proffered evidence of Alexander's prior bad acts.

B. Right to Present a Defense

Defendant complains that the trial court's decision to exclude the evidence prevented her from mounting a defense. We review constitutional questions de novo. *In re Hawley*, 238 Mich App 509, 511; 606 NW2d 50 (1999).

Defendant relies on *Chambers v Mississippi*, 410 US 284; 93 S Ct 1038; 35 L Ed 2d 297 (1973), to support her claim that she had a right to introduce evidence that someone else may have committed the crime. In *Chambers*, however, evidence showed that someone else had confessed to committing the crime, but the court prevented the defendant from examining that person as an adverse witness. *Id.* at 287-289, 291-292. Similarly, in *Holmes v South Carolina*, 547 US 319, 326-331; 126 S Ct 1727; 164 L Ed 2d 503 (2006), the Supreme Court ruled that the trial court erred by excluding evidence that another suspect was in the victim's neighborhood on the morning of an assault, and that the person admitted to committing the crime.

¹ Although defendant submitted a lengthy list of prior bad acts to the trial court, at a hearing on her motion in limine to allow evidence of Alexander's prior bad acts, she narrowed her focus to these three acts.

Here, unlike *Chambers* and *Holmes*, there is no claim that Alexander confessed to this crime or otherwise incriminated himself. Rather, contrary to MCR 404(b)(1), defendant merely sought to introduce evidence of past instances of Alexander's violent conduct to show that he may have acted accordingly in the present case.

The evidence offered by defendant did not sufficiently connect Alexander to the charged crime, its tendency to implicate Alexander was speculative and remote, and as discussed, the evidence did not tend to prove or disprove any material fact at issue in defendant's trial. See *Holmes*, *supra* at 327. Accordingly, the exclusion of this evidence did not deprive defendant of a fair opportunity to defend herself. See *Chambers*, *supra* at 302, and *Holmes*, *supra* at 330.

C. Confrontation Clause

Defendant further claims that, by excluding evidence of Alexander's prior bad acts, the trial court also deprived her of her right of confrontation. Because defendant did not raise a Confrontation Clause issue below, this issue is unpreserved and defendant has the burden of demonstrating a plain error affecting her substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A criminal defendant has a constitutional right to cross-examine a witness concerning "possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." *Davis v Alaska*, 415 US 308, 316; 94 S Ct 1105; 39 L Ed 2d 347 (1974). However, the Confrontation Clause does not encompass the right to impeach the general credibility of a witness. *Boggs v Collins*, 226 F3d 728, 736-738 (CA 6, 2000). "If a trial court has curtailed cross-examination from which a jury could have assessed a witness's bias, prejudice or motive to testify," the reviewing court must determine whether the jury, nonetheless, had enough information to assess the defendant's theory of the witness's bias, motive or prejudice, and if not, the court must then apply a balancing test to determine whether the state's interest supporting the trial court's preclusion outweighs the defendant's interest in showing bias, motive or prejudice. *Id.* at 739; see also *Davis*, *supra* at 317-321. However, this analysis does not apply where the defendant seeks to conduct a general attack on the witness's credibility and fails to articulate a plausible theory or "argument sounding in motive, bias or prejudice." *Boggs*, *supra* at 739-740. While "a defendant is not required to articulate a precise theory of bias at the trial level," the possibility of bias, motive, or prejudice must be apparent. *Id.* at 740 n 7.

Here, defendant concedes that she wanted to cross-examine Alexander about his prior bad acts to create the inference that he could have committed the crime. However, defendant fails to articulate any theory whereby Alexander's prior acts of misconduct would tend to show motive, bias, or prejudice in testifying against her, and no such theory of motive, bias, or prejudice is apparent.² Accordingly, and for the reasons set forth above, the trial court correctly

² The only prior bad act arguably bearing on Alexander's credibility was a prior misdemeanor conviction for providing a false identification to the police in 1999, which was used for impeachment at trial.

prohibited defendant from introducing Alexander's prior acts or cross-examining Alexander about them.

II. The Victim's Prior Injuries

Defendant also says that the trial court erred when it admitted evidence of the victim's prior injuries.

The record shows that the victim sustained several prior injuries and that defendant discussed those injuries with the police. These injuries included a forearm fracture, a foot burn, irritation to the eyes caused by air freshener spray, and an injury sustained during a fall down the stairs. There were also two other prior injuries, a broken rib and a fracture of the humerus bone, that were not discovered until the autopsy. There is no evidence that defendant knew about the latter two injuries.

The prosecutor introduced evidence of the victim's prior injuries for a proper purpose, i.e., to contradict defendant's statement to the police that she had to spank the victim very hard to get her point across (to the point where defendant's own hand hurt) because she believed that the victim was unable to feel pain. The evidence was also offered for another proper purpose, i.e., to show that defendant knew that the victim was susceptible to injury. Thus, the evidence was relevant to showing lack of mistake or accident.

The intent required for a murder conviction is malice, i.e., the intent to kill, to cause great bodily harm, or the wilful and wanton disregard of the likelihood that the natural tendency of one's actions will be to cause death or great bodily harm. *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). To convict a defendant of first-degree child abuse under MCL 750.136b(2), the prosecutor must show that the defendant "knowingly or intentionally" caused serious physical or mental harm to the child. The fact that defendant would hit the victim so hard that defendant's own hand hurt, despite knowing that the victim could feel pain and had previously been injured, was relevant to showing that defendant acted with an intent to cause great bodily harm, or with wilful and wanton disregard that death or great bodily harm might be the natural result of her actions. It was also relevant to show that defendant knowingly or intentionally caused serious physical harm to the victim. Thus, the evidence was probative of a fact of consequence at trial, defendant's intent. MRE 401.

Though the evidence presented a risk of prejudice, i.e., that the jury may draw the prohibited inference that defendant had repeatedly and seriously abused the victim in the past, and had probably done so on this occasion, the probative value of the four prior known injuries was high and the risk of unfair prejudice was alleviated by the trial court's cautionary instruction. Therefore, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. MRE 403. Thus, the trial court did not abuse its discretion in admitting the evidence of the victim's four known prior injuries.

On the other hand, the later-discovered upper arm and rib fractures were not relevant for the above purpose because no evidence showed that defendant knew about those injuries. However, expert witnesses testified that the broken rib and the twisting upper arm fracture were classic child abuse injuries. Defendant admitted that she previously inflicted severe beatings on the victim (under the claimed belief that the victim could not feel pain). Thus, defendant's own

statement tends to show that she beat the victim hard enough to cause these injuries. Therefore, the later-discovered injuries were relevant to show that defendant acted with malice or intentionally caused serious physical harm to the victim.

Moreover, because defendant admitted that she severely beat the victim in the past, and because these two injuries were caused by a severe beating, evidence of the later-discovered injuries was relevant to prove defendant's identity as the perpetrator. Compare *People v Knox*, 469 Mich 502, 513; 674 NW2d 366 (2004) (where there was no evidence that the defendant had committed the abuse that resulted in the child's prior injuries, it was error to allow the prosecutor to use that evidence to convince the jury that the defendant had caused the prior injuries). Intentionally inflicted child abuse injuries such as these were also relevant to show lack of accident. *Id.*

Because evidence of the two later-discovered injuries was probative of contested issues at trial, and the trial court's cautionary instruction alleviated the risk of unfair prejudice, we hold that the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. Accordingly, the trial court did not abuse its discretion when it admitted the evidence.

Affirmed.

/s/ Henry William Saad
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering